Supreme Court, U.S.
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No. 15-338

# In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

*Petitioners,*

v.

PAMELA GILLIE AND HAZEL MEADOWS,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

This case asks whether Congress, through the Fair Debt Collection Practices Act, meant to interfere with the way in which a State engages in a sovereign function—its debt collection. Ohio requires its Attorney General to collect debts owed to the State. It authorizes the Attorney General to "appoint special counsel," in addition to employees, "to represent the state in connection with" this debt collection. The law requires that the Attorney General give special counsel the office's letterhead for use in collecting tax debts, and the Attorney General has read the law as giving him discretion over whether those counsel use that letterhead for other debts owed to the State.

The Fair Debt Collection Practices Act bars "debt collectors" from "us[ing] any false, deceptive, or misleading representation or means," 15 U.S.C. § 1692e, but expressly does not apply to "any officer or employee" of a "State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," *id.* § 1692a(6)(C). In this case, a divided Sixth Circuit held that special counsel do not qualify for this state exemption and that a jury could find their use of state letterhead "misleading."

The case presents two questions:

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below (and the Petitioners joining this Petition) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA. Defendant-Appellee Wiles, Boyle, Burkholder & Bringardner Co., LPA, has no parent company, and no publicly held company owns 10% or more of it.

Ohio Attorney General Michael DeWine (also a Petitioner) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

Eric A. Jones and the Law Office of Eric A. Jones, LLC, were also Defendants-Appellees below.

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## OPINIONS BELOW

The Sixth Circuit's denial of en banc review, Pet. App. 1a-17a, is unpublished. Its decision, Pet. App. 18a-76a, is published at 785 F.3d 1091. The district court's decision, Pet. App. 77a-101a, is published at 37 F. Supp. 3d 928.

## JURISDICTION

On May 8, 2015, the Sixth Circuit issued its decision. On July 14, 2015, it denied petitions for rehearing en banc. Petitioners timely filed a petition for certiorari on September 15, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act (referred to in this brief as the "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977), is codified as amended at 15 U.S.C. §§ 1692-1692p. It defines "debt collector" to exclude "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *Id.* § 1692a(6)(C). It prohibits debt collectors from engaging in "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. This brief's appendix includes relevant sections of the Act.

## STATEMENT OF THE CASE

### A. The States' Prerogatives Regarding Debts Have Long Been Viewed As An Important Aspect Of Their Sovereignty

"From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting).

For debts owed *by* States, sovereign immunity has granted them "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *The Federalist* No. 81, p.487 (Alexander Hamilton) (C. Rossiter ed., 2003). For debts owed *to* States, many sovereign privileges have historically accompanied their debt-collection efforts.

As one example, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). Magna Carta took this right as a given, demanding only that the crown seek goods ahead of lands. Magna Carta, ch. 8, *in* 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 18 (1797). Similar debt-collection methods were replicated "in the laws of the various American colonies and, after independence, the States." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (Scalia, J., concurring in judgment); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 & n.5 (1931). This Court upheld these summary procedures as applied against a U.S. revenue receiver. *Murray's Lessee*, 59 U.S. at 276-80.

As a second example, the crown viewed it as a sovereign "prerogative" to have its "debt paid before the debt of any subject." *Sir Edward Coke's Case*, 78 Eng. Rep. 169, 169-70 (Ct. of Wards 1624); 3 William Blackstone, *Commentaries on the Laws of England* 420 (1768). Many States "succeeded to [this] prerogative right" of priority under their common law. *U.S. Fid. & Guar. Co. v. Bramwell*, 217 P 332, 336 (Or.

1923); *Aetna Accident & Liab. Co. v. Miller*, 170 P 760, 760-63 (Mont. 1918). This Court enforced the right against "property in the hands of a receiver appointed by a federal court." *Marshall v. New York*, 254 U.S. 380, 385 (1920).

As a third example, in perhaps the earliest use of the "clear-statement rule," courts refused to interpret general bankruptcy laws as discharging debts owed to the crown. *Anon.*, 26 Eng. Rep. 167 (Ch. 1745); *Rex v. Pixley*, 145 Eng. Rep. 647 (Exch. 1726). States invoked the same rule—that the "sovereign" was not "named" and so "not bound"—when construing early bankruptcy laws as not discharging state debts. *Commonwealth v. Hutchinson*, 10 Pa. 466, 468 (1849); *State v. Shelton*, 47 Conn. 400, 404-07 (1879); *cf. United States v. Herron*, 87 U.S. 251, 263 (1873). While bankruptcy laws now discharge some state debts, *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985), this Court's cases illustrate that the clear-statement rule lives on in the bankruptcy context, *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986).

The aspect of sovereignty at issue here is more basic, but no less important, than these privileges. This case does not ask whether a State may seize property, demand payment first, or prevent a debt's discharge. It asks only whether a State may *notify* debtors that they owe state debts and that the counsel collecting the debts acts for the State's chief debt collector—its Attorney General. Treating a State's interest in its debt-collection methods as a "policy" concern, the Sixth Circuit held that special counsel to Ohio's Attorney General could not convey that they sent letters for the Attorney General without risking liability under the Act. Pet. App. 38a.

### B. Ohio Has Long Delegated The Duty To Collect Debts To Its Attorney General

1. *Ohio Attorney General.* In 1846, Ohio passed a law "[t]o create the office of Attorney General, and to prescribe his duties." 44 Ohio Laws 45, 46 (1846). Ohio has since directed the Attorney General to represent "the state and all its departments" in court. Ohio Rev. Code § 109.02.

From the office's creation until today, the Attorney General has relied on "special" counsel to perform this duty. In the 1800s, the Attorney General had one employee, but could hire "local counsel" to assist in civil actions. Rev. Stats. of Ohio § 202 (Clarke & Co. 1891); 73 Ohio Laws 189, 191 (1876). By the 1900s, Ohio authorized the Attorney General to appoint three lawyers to permanent posts, but again gave the Attorney General broad "power to employ special counsel." 97 Ohio Laws 59, 60 (1904). Only later did the Attorney General obtain general authority to hire "assistant attorneys general." 114 Ohio Laws 53, 53 (1931).

Today, Ohio authorizes the Attorney General to employ assistant attorneys general, Ohio Rev. Code § 109.03, or to "appoint special counsel to represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested," *id.* § 109.07. Specific statutes reinforce that the Attorney General may choose between assistant attorneys general and special counsel. *See, e.g., id.* §§ 109.81 (antitrust); 109.84 (workers compensation); 119.10 (administrative proceedings); 2743.14 (court of claims). Ohio's civil-service laws thus identify special counsel alongside assistant attorneys general as in the "unclassified" "civil ser-

vice of the state." *Id.* § 124.11(A)(11). They define "civil service of the state" to include "all offices and positions of trust or employment with the government." *Id.* § 124.01(K).

2. *Debt-Collection Duties.* Since 1846, Ohio has authorized the Attorney General to sue those "owing debts to the state." 44 Ohio Laws at 47 The Attorney General retains this duty today. Ohio Rev. Code § 131.02(A)-(C). State debts can range from tax debts, to educational debts owed to state colleges, to medical debts owed to state hospitals. J.A. 92, 112.

Ohio employs a three-step process to collect debts. At step one, the state creditor attempts to collect for 45 days. Ohio Rev. Code § 131.02(A). At step two, the creditor certifies the debt to the Attorney General. *Id.* At step three, if the Attorney General concludes that the debt has become an "uncollectible" or "final overdue claim," the State may release or sell the debt. *Id.* §§ 131.02(F)(1), 131.022(B).

At the second step, after a debt has been certified, "[t]he attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness." *Id.* § 131.02(B)(1). The Attorney General must "collect the claim or secure a judgment and issue an execution for its collection." *Id.* § 131.02(C). Attorneys General have undertaken these tasks through internal and external collectors, and through both assistant attorneys general and special counsel. *See* J.A. 95-100. Since 1937, Ohio has allowed the Attorney General to "appoint special counsel to represent the state" in connection with debts "certified to the attorney general," and to pay special counsel from the recovered funds. Ohio Rev. Code § 109.08; 117 Ohio

Laws 304, 304-05 (1937). This debt-collection duty requires significant effort. To put it in perspective, from July 2011 to June 2012, the office collected over $466 million—$191 million of which came through special counsel. J.A. 100.

This case concerns special counsel's use of Attorney General letterhead. In 1989, Ohio passed tax legislation "popularly referred to as the Ohio Taxpayers' Bill of Rights." Anthony L. Ehler & Randall A. Osipow, *Am. Sub. S.B. 147: Ohio Taxpayers' Bill of Rights*, 3.5 Ohio Tax Review 10, 10 (Sept./Oct. 1989). The law granted taxpayers rights against the State. 143 Ohio Laws 877, 879-86 (1989). As relevant here, one section directed the Attorney General to "provide to the special counsel appointed to represent the state in connection with [tax] claims the official letterhead stationery of the attorney general." *Id.* at 877 (codified at Ohio Rev. Code § 109.08). It *required* special counsel to "use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes." *Id.* The next section directed the Attorney General to appoint "problem resolution officers" to handle concerns from tax debtors about the employee or "special counsel assigned to the case." *Id.* at 877-78 (codified at Ohio Rev. Code § 109.082).

The Attorney General's Office has interpreted Ohio Rev. Code § 109.08—that special counsel "shall" use the letterhead for tax debts, but only with respect to those debts—as commanding counsel to use the letterhead for tax debts, but leaving it to the Attorney General to decide whether they use it for other state debts. The office has likewise interpreted Ohio Rev. Code § 109.082—that problem resolution

officers "shall" handle tax-debt concerns—as requiring them to handle tax complaints, but leaving it to the Attorney General to allow them to handle other inquiries. Plaintiffs "categorically deny" challenging this interpretation of state law, which the office believes to be longstanding. *See* J.A. 114.

3. *Retention Agreements.* During the relevant period, special counsel applied for one-year retention agreements with the Attorney General. J.A. 142, 171. The agreements addressed special counsel's interactions with the office and with debtors.

As for special counsel's relationship with the office, it appointed them "to provide legal services on behalf of the Attorney General to assist in the collection of past due debt." J.A. 173. Special counsel were independent contractors; they bought their own insurance, paid their own expenses, and hired their own employees. J.A. 172-73, 189-90, 193-94. Yet the office generally oversaw their collection. It assigned claims to them. J.A. 173-74. Before suing or settling, counsel had to obtain the office's approval. J.A. 179. Special counsel also had to follow various policies for protecting confidential information, preserving records, and interacting with debtors, and they remained subject to periodic audits. J.A. 177-78, 191-93, 388; *see* J.A. 97-101.

As for special counsel's dealings with debtors, the contracts required special counsel, "[i]n all pleadings, notices and/or correspondence," to indicate that the document was "prepared by the Special Counsel in its position as Special Counsel for the Attorney General." J.A. 173. The Attorney General's Office "expect[ed] Special Counsel to provide services to the public in a manner that will preserve or enhance

goodwill between the public and the State," and had "zero tolerance" for actions demonstrating "less than complete respect for the rights and reasonable expectations of the public." J.A. 193. Accordingly, special counsel had to follow "the same standards of behavior as set forth in" the Act. J.A. 194.

### C. The District Court Rejected Plaintiffs' Claims That Special Counsel's Use Of State Letterhead Violated The Act

1. In 2012, Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA, was one special counsel. J.A. 387 In earlier years, Bruce Burkholder had been special counsel at Wiles. *Id.* In 2007, Burkholder filed suit against Plaintiff Hazel Meadows, a University of Akron graduate, to recover a university debt. J.A. 388. Meadows agreed in a judgment entry signed by her attorney to make monthly payments. J.A. 389-90. She paid for several years. J.A. 385.

In July 2012, Sarah Sheriff, a Wiles employee, fielded a call from Meadows "ask[ing] [Sheriff] for her balance." J.A. 385. Sheriff sent a letter identifying the balance. Pet. App. 17a. The letterhead identified the office's Collections Enforcement Section. *Id.* The body read: "Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." *Id.* Sarah Sheriff signed the letter; under her name was the law-firm name and address; under the address was the notation "Special Counsel to the Attorney General." *Id.* Because the letter merely responded to Meadows,

Sheriff did not think it mattered that she signed the letter rather than Mark Sheriff. J.A. 385.

"Though the letter said that it was in response to [Meadows's] request for information," Meadows did not "recall ever asking anyone for any information about this matter." J.A. 139. The letter allegedly "scared [her] because [she] thought that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." *Id.* She took the letter to her attorney, and says she sought counseling. J.A. 139-40.

2. Eric Jones has served as special counsel since 2007 J.A. 207 On May 24, 2012, he sent Plaintiff Pamela Gillie a letter on the primary Attorney General letterhead. Pet. App. 14a. The letter included a "balance." Its body said: "You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate payment call DENISE HALL at Eric A. Jones, L.L.C., to make arrangement to pay this debt." *Id.* Jones signed the letter as "Outside Counsel for the Attorney General's Office." *Id.* He listed his return address on the bottom. *Id.*

Gillie alleged that she was confused about why Jones sent a letter for the Attorney General, and thought it might be a scam because it asked to send money to a law firm. J.A. 136. Having filed for bankruptcy, she allegedly feared that "the Attorney General might garnish my wages" or "somehow stop or delay my bankruptcy case." J.A. 137 She, too, contacted her attorney. *Id.*

3. Plaintiffs brought suit against Mark Sheriff, Sarah Sheriff, and Wiles, and Eric Jones and his firm

alleging violations of 15 U.S.C. § 1692e. J.A. 35-58. Their five-count complaint asserted that special counsel's use of state letterhead: (1) falsely represented that special counsel were affiliated with the Attorney General under § 1692e(1); (2) simulated letters authorized by the Attorney General under § 1692e(9); (3) falsely indicated that the Attorney General was the primary party involved in the collection in violation of § 1692e(10); (4) used a name that was not special counsel's "true name" in violation of § 1692e(14); and (5) alternatively, made special counsel's law-firm names not their "true names," causing those names to violate § 1692e(14). J.A. 53-56.

The district court granted the Attorney General's motion to intervene, and bifurcated proceedings by initially deciding whether special counsel were "debt collectors" and whether their use of state letterhead was misleading. D.Ct. Doc.42, Order, PageID#480-84.

After both sides moved for summary judgment, the court ruled for special counsel. Pet. App. 78a. *First*, it found that special counsel were not debt collectors because they fell within 15 U.S.C. § 1692a(6)(C)'s exemption for government "officers or employees." Pet. App. 84a-90a. The Dictionary Act defines "officer" as "'any person authorized by law to perform the duties of the office.'" Pet. App. 87a (quoting 1 U.S.C. § 1). This definition applied, the court held, because the Attorney General bore the duty to collect state debts, and a statute authorized special counsel to assist him. *Id.*

*Second*, the court found nothing "misleading" about special counsel's use of state letterhead. Pet. App. 90a-98a. It held that "[t]he letters accurately

reflect [the] relationship" of special counsel to the Attorney General. Pet. App. 96a. It added that the letter from Sarah Sheriff "require[d] additional analysis" because she was not special counsel. *Id.* Since the letter merely responded to an inquiry and was not otherwise inaccurate, the court held, it was not "materially misleading." Pet. App. 97a.

**D. The Sixth Circuit Reversed**

1. The Sixth Circuit remanded for trial. Starting with the state "officer" exemption, it held that special counsel were not "authorized by law" to perform "the duties of the office." Pet. App. 28a-44a. The court stated that a contract, not a law. gave special counsel authority to collect debts. Pet. App. 32a-33a. While Ohio Revised Code § 109.08 authorized the Attorney General to appoint them, the court construed "authorized by law" to reach only laws immediately authorizing conduct. *Id.* It also read "the duties of the office" to require an appointee to be able to perform *all* duties of the office, not just *some*. Pet. App. 35a.

The court added three general points about this exemption. It cited cases holding that independent contractors were not "officers." Pet. App. 36a-38a. It rejected reliance on the "clear-statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because "[t]his case is about third-party debt collectors." Pet. App. 39a. And it suggested that special counsel were not "officers" under Ohio law. Pet. App. 39a-42a.

Turning to the merits, the court stated that the Act bars statements that could "confuse the least sophisticated consumer." Pet. App. 46a. Under this standard, the court held, a jury could find that special counsel's use of state letterhead violated

§ 1692e(9) and (14), the provisions that Plaintiffs cited on appeal. Pet. App. 47a-54a. "The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." Pet. App. 49a. And while the signature clarified that the sender was "outside" or "special" counsel, "[t]he independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a.

2. Judge Sutton dissented. He noted that special counsel fit the officer definition "to a tee." Pet. App. 57a. A law authorized counsel to collect debts for the Attorney General, and debt collection was an official duty. *Id.* The word "officer" was at least ambiguous, but "[w]hen Congress purports to regulate core state functions, it must do so unambiguously." Pet. App. 58a.

On the merits, the dissent found nothing misleading about the letters. Pet. App. 63a-70a. "[S]pecial counsel are no different from assistant attorneys general paid to recover the State's money." Pet. App. 64a. Their use of Attorney General letterhead does not falsely imply that the letters came from the Attorney General, because the "letters *do* come from the Attorney General." Pet. App. 65a.

3. The Sixth Circuit denied rehearing en banc. Judge Clay's concurrence noted that the letterhead could mislead debtors "into believing that [they were] being contacted directly by the attorney general's office rather than debt collection attorneys," which could intimidate them "into promptly paying the debt

out of fear that that the attorney general might take punitive action against them." Pet. App. 3a.

Judge Sutton—joined by Judges Boggs, Batchelder, Cook, and McKeague—made several additional points in dissent. Pet. App. 7a-11a. "How these letters could be misleading is beyond me," he noted, given that counsel sent the letters for the Attorney General. Pet. App. 8a. He added that "special counsel face potential liability coming and going" because "recipients will assume that the letter[s] do[] *not* concern a state debt" if counsel use private letterhead. Pet. App. 9a. And he reiterated that the "officer" exception applies because the case "implicates foundational federalism concerns." *Id.*

## SUMMARY OF ARGUMENT

The Court should reverse the decision below because (1) special counsel are state "officers" under 15 U.S.C. § 1692a(6)(C), and (2) their use of Attorney General letterhead accurately conveyed that they acted for the office under 15 U.S.C. § 1692e.

I.A. As courts have recognized, "officer" has a range of meanings. In a narrow sense, it covers those that must be appointed through the methods outlined by the Constitution's Appointments Clause. In a broader sense, it reaches those authorized to perform public duties. For two reasons, the Court should read the Act as adopting the broad definition.

The Act does not define "officer," and so triggers the Dictionary Act's broad default definition. Dating to 1871, this definition states that "officer" "includes any person authorized by law to perform the duties of the office." The definition's introductory words convey an expansive reach. Its use of the phrase

"authorized by law" conveys that a position must be "empowered" via an "enactment" rather than just a contract. And its use of the phrase "the duties of the office" conveys that the position must undertake "public" or "sovereign" duties.

The Act's context confirms this broad definition. As a specific matter, its text shows a healthy respect for federalism, ranging from its broad exemption for both officers and employees, to its inclusion of municipalities within that exemption, to its exclusion of tax debts. As a general matter, the Act's subject triggers this Court's "clear-statement rule." Under that rule, the exemption should be read broadly so that the Act does not interfere with a State's debt collection.

B. Special counsel meet the "officer" definition. Their position is "authorized by law." Ohio law has long empowered Ohio's Attorneys General to appoint special counsel for their debt-collection duty. Ohio law also fixes special counsel's method of payment: They are paid out of the claims they recover, a historically common practice. And because Ohio law does not identify special counsel's tenure, they serve at the pleasure of their appointing officer.

Special counsel's duties qualify as "sovereign." Courts have long viewed the traditional function of attorneys general—representing the sovereign in court—as a "sovereign" duty. The year before Congress passed the Act, this Court held that *constitutional* officers must conduct civil litigation for the federal government to vindicate public rights. The types of claims at issue reinforce that special counsel perform sovereign duties. Persons handling public funds have long been treated as officers.

At the least, the Court may reasonably read the exemption as covering special counsel. The clear-statement rule thus compels a ruling in their favor.

C. The Sixth Circuit mistakenly reached the contrary result. *First*, it read the "officer" definition too narrowly. It said that special counsel were not "authorized by law" even though a statute authorizes the position. And it said that, to be officers, special counsel would have to perform "all" duties of the Attorney General's Office even though the definition lacks the word "all." *Second*, the Sixth Circuit's narrow view of the clear-statement rule (as limited to laws affecting state structure) conflicts with this Court's broad use of it. *Third*, the Sixth Circuit placed undue weight on special counsel's status as independent contractors, both because the Act reaches "officers" *and* "employees" and because not all officers have historically been traditional employees. *Fourth*, the Sixth Circuit mistakenly relied on Ohio's state-law definitions. This case concerns the meaning of a federal statute. Regardless, the Sixth Circuit wrongly suggested that special counsel *categorically* are not officers under state law; they are, for example, officers under Ohio's public-records laws.

II. Special counsel's use of Attorney General letterhead comported with 15 U.S.C. § 1692e(9) and (14), the provisions on which Plaintiffs relied below.

A. Section 1692e bans "false, deceptive, or misleading" communications, and identifies sixteen prohibited practices. To violate § 1692e, a communication must initially be capable of leading consumers to believe an "untruth." To assess whether a communication may do so in other contexts, courts have adopted an objective test tied to an "average" person

in the intended audience. That test best balances this Act's competing goals. A focus on average *consumers*—the intended audience—recognizes that the audience receiving debt-collection letters will often be unsophisticated. And a focus on *average* consumers protects conscientious debt collectors from unreasonable misinterpretations. By comparison, the courts adopting the "least-sophisticated consumer" standard do not apply that standard in practice and created it from whole cloth.

To violate § 1692e, a communication must also be capable of leading consumers "astray in [their] action or conduct," i.e., it must be material. Materiality is an ordinary element of claims based on misleading statements—as evidenced by its use under the Federal Trade Commission Act and by the circuit agreement that it applies under this Act.

Section 1692e's subsections reinforce these standards. They ban practices (like impersonating an official) that could materially mislead average consumers. The two prohibitions on which Plaintiffs relied below illustrate as much. The first (§ 1692e(9)) bars debt collectors from using written communications that "simulate," or "falsely represent" to be, documents authorized, approved, or issued by the government. In other words, it bars debt collectors from pretending to act for the government. The second (§ 1692e(14)) prohibits debt collectors from using names that are not their "true name." In other words, it prohibits them from using pseudonyms.

B. Special counsel's use of Attorney General letterhead could not lead any consumer to believe a material falsehood. The letterhead accurately conveys that the letters were sent for the organization identi-

fied (the Attorney General's Office). The letterhead did not violate § 1692e(9) by "falsely representing" or "simulating" that it was authorized by the office; it was, in truth, *required* by that office. And the letterhead did not violate § 1692e(14) because special counsel *do* use a "true name" when they invoke the office's name to collect state debts.

C. The Sixth Circuit wrongly held the opposite. *First*, it noted that the letterhead might lead consumers to believe that the Attorney General *personally* sent the letters. But the letters' signatures show that he did not. *Second*, it noted that the letterhead might lead consumers to believe that the letters were sent by the office. But special counsel *do* act for the office. That they are independent contractors does not change that fact; they have the same general authority as assistant attorneys general to collect state debts. *Third*, it noted that consumers have asked the office whether the letters are authentic. But the office says "yes" in response. And if this suit requires special counsel to remove that letterhead, consumers might not know to call the office with concerns. *Fourth*, it said that the letterhead was intimidating. But § 1692e prohibits debt collectors from deceiving debtors, not from making accurate representations that some might find intimidating. And state creditors *do* have authority that private creditors do not—such as the ability to take income-tax refunds. *Fifth*, it noted that Sarah Sheriff was not special counsel. But that letter-specific issue conflicts with the complaints' class-based counts, and is immaterial.

## ARGUMENT

### I. THE ACT'S GOVERNMENT "OFFICER" EXEMPTION COVERS SPECIAL COUNSEL

The Act regulates "debt collector[s]," a term that excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). The word "officer" in this exemption covers positions, like special counsel, that are statutorily empowered to litigate claims for state debts on an Attorney General's behalf. The Sixth Circuit's contrary view conflicts with the Act's text, with our nation's history, and with basic constitutional principles.

#### A. The "Officer" Exemption Covers Positions Statutorily Empowered To Litigate Claims For A State

More so than other words, "officer" is, to quote Judge Hand, a "chameleon[]" that "reflect[s] the color of [its] environment." *Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948). For years, courts have recognized that, "'as used in certain statutes or constitutional provisions,'" it "'may include certain positions, places, and persons, which would not be embraced within the meaning of the same word[]'" in other provisions. *Gerald v. Walker*, 78 So. 856, 858 (Ala. 1918) (citation omitted).

A perusal of the U.S. Code bears this out. At times, federal laws may convey a stricter meaning for "officer," one limited to positions falling within the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. The Court has sometimes read "officer" this way in the criminal context where the rule of lenity looms

large. *United States v. Germaine*, 99 U.S. 508, 509-11 (1878). Other times, laws may expressly define "officer" for particular purposes, as in Title 5 (federal personnel) or Title 10 (the military). 5 U.S.C. § 2104; 10 U.S.C. § 101(b)(1). Still other times, laws may "use[] the word 'officer' in a less strict sense," one that conveys a "more popular signification." *United States v. Hendee*, 124 U.S. 309, 313 (1888). In this broader sense, "officer" has long meant any "person commissioned or authorized to perform any public duty." 2 Noah Webster, *An American Dictionary of the English Language* (1828).

The Act does not define "officer," but two factors show that it has a broad meaning encompassing all positions statutorily empowered to litigate claims for a State: (1) its silence triggers the Dictionary Act's expansive default definition; (2) its context reinforces that the word sweeps broadly.

### 1. The Dictionary Act defines "officer" to include positions statutorily empowered to perform sovereign duties

The Dictionary Act states that, "unless the context indicates otherwise," "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. This definition dates to 1871, making its meaning at that time relevant. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (noting that "the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense"). The definition's three parts show a broad reach.

*Includes Any Person.* The definition starts with two clues signaling expansive coverage. It "is introduced with the verb 'includes' instead of 'means.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012). That verb makes the definition "more susceptible to extension of meaning." *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (citation omitted). It also covers "any" person satisfying its elements. That adjective, too, has "an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). These word choices direct courts not to give a cramped reading to the elements that follow.

*Authorized By Law.* The definition requires a person's position to be "authorized by law." This means that an enactment ("law") has empowered ("authorized") the person's actions. 1 *The Century Dictionary & Cyclopedia* 387 (1897) (defining "authorize" as "[t]o give authority, warrant, or legal power to; empower (a person)"); *Black's Law Dictionary* 691 (1st ed. 1891) (defining "law" as "enactment; a distinct and complete act of positive law"). Under this text, a law need only sanction a position; it need not specify all of the particulars.

The 1871 legal backdrop confirms that a law could generally create an officer position, while leaving it to a superior to fill in its details. Where, for example, a law allowed an assistant treasurer to appoint "clerks" without specifying their duties, this Court held that a clerk was an officer under a criminal law (and the Appointments Clause). *United States v. Hartwell*, 73 U.S. 385, 393 (1867). Likewise, where a law did not specify the pay due to a deputy sheriff, a sheriff could contract with the deputy regarding pay. Floyd Mechem, *A Treatise on the*

*Law of Public Offices and Officers* § 379, p.250 (1890). And where a law did not fix the officer's term, it created an at-will position. *Id.* § 445, p.284.

*Duties Of The Office.* The definition requires a person "to perform the duties of the office." In 1871, a public "office" had an established meaning. It was "the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual [was] invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." *Id.* § 1, pp.1-2. As one case noted, the "essence of [a public office] is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State." *Clark v. Stanley*, 66 N.C. 59, 63 (1872). As another said, "[w]hether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office." *Rowland v. Mayor of N.Y.*, 83 N.Y. 372, 376 (1881).

In 1871, moreover, there was "'no very clear conception of a professional office'" in which a person "'devote[d] his entire time to the discharge of public functions.'" *Filarsky v. Delia*, 132 S. Ct. 1657, 1662 (2012) (citation omitted) (interpreting 42 U.S.C. § 1983). To determine whether an individual was an "officer," therefore, courts often applied a *functional* approach (one examining "the nature of the functions to be performed"), not a *formalistic* approach (one examining "the presence or absence of an official designation"). *State ex rel. Clyatt v. Hocker*, 22 So. 721,

722 (Fla. 1897); *State ex rel. Att'y General v. Kennon*, 7 Ohio St. 546, 557-58 (1857). And "[t]he most important characteristic which distinguishe[d] an office from an employment or contract [was] that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government." Mechem, *supra*, § 4, p.5.

Examples flesh out this "sovereignty" divide. On one hand, litigating state interests was considered a sovereign duty, one associated with attorneys general. *See Buckley v. Valeo*, 424 U.S. 1, 139 (1976); *People v. Miner*, 2 Lans. 396, 398 (N.Y. Sup. Ct. 1868). Sovereign functions also included handling public money—either receiving it, *Commonwealth v. Evans*, 74 Pa. 124, 139 (1874), or spending it, *United States v. Maurice*, 26 F. Cas. 1211, 1214-15 (C.C.D. Va. 1823) (Marshall, J.). On the other hand, a surgeon who examined patients seeking public pensions was not an "officer" given "the nature of [his] employment." *Germaine*, 99 U.S. at 512. And a person preserving timber on public lands was not an officer because his tasks were "not essentially different from" those of "a contractor to build a state house." *Opinion of the Justices*, 3 Me. 481, 483 (1822).

In sum, the Dictionary Act codified the historically broad meaning of "officer," one that reached all persons legally authorized to perform public duties. Unless the Act's specific context proves otherwise, this definition applies here.

### 2. Context confirms that the Act adopts a broad "officer" definition

Far from proving otherwise, the Act's context—both its text and more general principles—reinforces that it adopts a broad "officer" definition.

*The Act's Text.* The exemption conveys a broad reach. It expansively exempts *both* officers *and* employees with "official" debt-collection duties. 15 U.S.C. § 1692a(6)(C). In other contexts, the phrase *federal* "officer or employee" has been read broadly to cover a D.C. jail superintendent required to keep federal prisoners, *Reid v. Covert*, 351 U.S. 487, 489-90 (1956), *rev'd on other grounds* 354 U.S. 1 (1957) (former jurisdictional statute), a deputized local police officer, *United States v. Luna*, 649 F.3d 91, 101 (1st Cir. 2011) (18 U.S.C. § 111), or an "intermittent consultant or adviser to a department or agency of the Government," *Conflict-of-Interest Statutes*, 42 Op. Att'y Gen. 111, 111 (1962) (former conflict-of-interest laws). Courts have also read "official duties" broadly to cover actions taken as part of an individual's duties, whether assigned by a statute or superior. *See United States v. Drapeau*, 644 F.3d 646, 652-53 (8th Cir. 2011) (18 U.S.C. § 111); *Heredia v. Green*, 667 F.2d 392, 395-96 (3d Cir. 1981) (the Act).

When read as a whole, § 1692a reiterates that the Act steers clear of state functions, reinforcing that "officer" should be read that way too. The definition of "debt collector," for example, covers any "person," *id.* § 1692a(6), triggering the "presumption that 'person' does not include the sovereign," *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). The Act goes even further by defining "State" broadly to include municipalities. 15

U.S.C. § 1692a(8). It also defines "debt" in a way that excludes tax debts. *See id.* § 1692a(5).

*General Principles.* That "officer" falls within a state exemption confirms its broad sweep. "Among the background principles of construction that [the Court's] cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Given this "'dual system of government,'" the Court refuses to read federal laws as "impinging upon important state interests" unless Congress speaks clearly. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). By "resolv[ing] ambiguity" in favor of States, *Bond*, 134 S. Ct. at 2090, this rule respects their "sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," *Gregory*, 501 U.S. at 461.

This clear-statement rule often leads courts to read "federal legislation threatening to trench on the States' arrangements for conducting their own governments" "in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). This Court, for example, read a preemption law's savings clause—which preserved certain *state* safety laws—as covering *local* ordinances as well, thereby respecting "a State's decision on the division of authority between the State's central and local units." *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002). Likewise, it adopted a functional test to determine who may invoke § 1983's immunities, thereby respecting the diverse ways that States have

structured their affairs. *See Filarsky*, 132 S. Ct. at 1662-65.

Here, as noted, *supra* at 1-4, the Act touches a sensitive area, public debts, that raises sovereignty concerns. The clear-statement rule thus directs the Court to read "officer" broadly so as not to exclude persons a State has statutorily empowered to perform its collection duties because of the manner in which the State structures that relationship. After all, "[t]he States' sovereign authority gives them power to structure their legal departments as they please." Pet. App. 58a (Sutton, J., dissenting). And history teaches that the common way that governments structure themselves today was not the common way they structured themselves yesterday and may not be the common way they structure themselves tomorrow.

Two examples from *Filarsky*—one from the federal level, the other from the state—prove this point. At the federal level, even such a high-ranking person as "the Attorney General of the United States was expected to and did maintain an active private law practice" until 1853. *Filarsky*, 132 S. Ct. at 1663. In that regard, *Chisholm v. Georgia*, 2 U.S. 419 (1793)—which subjected States to suit in federal court—is relevant here not just because its short lifespan shows that federal litigation affecting "the People's money" raises sovereignty concerns. Pet. App. 58a (Sutton, J., dissenting). It is relevant because the lawyer for the *private plaintiff* was none other than Edmund Randolph, the first Attorney General. *Chisholm*, 2 U.S. at 419. (He was sure to disavow that "the United States themselves may be sued." *Id.* at 425.) That the chief legal officer

worked for the federal government "like an attorney on retainer," William Barr, *Attorney General's Remarks*, 15 Cardozo L. Rev. 31, 31 (1993), that his "private law office was the seat of his official duties," Leonard White, *The Federalists: A Study in Administrative History* 166 (1948), and that he had to buy his own "office supplies," Griffin Bell, *The Attorney General*, 46 Fordham L. Rev. 1049, 1051 (1978), all prove that "officer" extends beyond traditional employees.

At the state level, more than just public employees exercised law-enforcement powers. *Filarsky*, 132 S. Ct. at 1664. States permitted sheriffs to appoint "special" deputies for specific tasks, and courts treated them as protected by laws making it a crime to resist officers. William Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 83, p.48 (1884); *Andrews v. State*, 78 Ala. 483, 485 (1885). "[A] person charged with the performance of one public duty," a court held, "is as much an officer, while engaged in its performance, as another who is charged with the performance of many public duties." *State v. Moore*, 39 Conn. 244, 250 (1872). Similarly, it was "a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers." *NLRB v. Jones & Laughlin Steel Corps.*, 331 U.S. 416, 429 (1947). Although employed by private entities, they were "public officers when performing their public duties." *Id.* at 431. As one example, many who guarded the rails from the infamous train robbers of the late 1800s were public officers paid by private companies (in Ohio, their "shield" contained *both* the word "police" *and* the private railroad's name). 57 Ohio Laws 60, 60-61 (1867).

### B. Special Counsel Are "Officers" Under The Act Because Ohio Law Empowers Their Position To Perform Sovereign Duties

Special counsel are state "officers" under the Act because their position is legally empowered to perform the Attorney General's debt-collection duties.

*Authorized By Law.* Special counsel's duties are "authorized by law." Ohio law requires the Attorney General's Office to represent Ohio, Ohio Rev. Code § 109.02, and to notify debtors of their state debts, *id.* § 131.02(B)(1). It adds, however, that "[t]he attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." *Id.* § 109.08. Accordingly, an "enactment" "empowers" special counsel's position.

If anything, this law provides more authorization than the statute in *Hartwell* that created constitutional officers. Here, like there, the legislature authorized a superior "to appoint" an inferior. *See Hartwell*, 73 U.S. at 393. But here, unlike there, Ohio law identifies the approved duties. The clerk's duties in *Hartwell* "were to be such as his superior in office should prescribe." *Id.*

Further, Ohio law directs special counsel to be paid, like many officers historically, "from funds collected by them in an amount approved by the attorney general." Ohio Rev. Code § 109.08. Following the Constitution's adoption, "[b]y far the larger number of federal officials were compensated by fees" from third parties. White, *supra*, at 298. As one ex-

ample, a 1791 law setting excise duties on liquor (the law that triggered the Whiskey Rebellion) authorized President Washington to pay collection officers "out of the product of the said duties, as he shall deem reasonable and proper" up to certain amounts. Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213.

Finally, special counsel's tenure is "not fixed by" state law. Mechem, *supra*, § 445, p.284. That triggers the "general rule" that the position is held "at the will of either party." *Ex Parte Hennen*, 38 U.S. 230, 260-61 (1839); J.A. 185-86.

*Duties Of The Office.* Special counsel perform "the duties of the" Attorney General's Office. Ohio law directs the office to collect state debts "or secure a judgment and issue an execution for its collection." Ohio Rev. Code § 131.02(C). In two respects, these tasks are "public" charges vesting counsel "with some portion of the sovereign functions of the government." Mechem, *supra*, § 1, pp.1-2.

To begin with, it has long been considered a public duty to represent the sovereign. Dating to colonial times, it was the duty of attorneys general "to prosecute all actions, necessary for the protection and defence of the property and revenues of the crown." *Miner*, 2 Lans. at 398. "They were lawyers, but their powers were the powers of the state." Homer Cummings & Carl McFarland, *Federal Justice* 12 (1937). And while "[t]he prerogatives which pertain to the crown of England are here vested in the people," the "necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there." *Hunt v. Chicago, Horse, & Dummy R.*

*Co.*, 13 N.E. 176, 181 (Ill. 1887). The year before Congress passed the Act, therefore, this Court held in the Appointments Clause context that only "Officers of the United States" may undertake "primary responsibility for conducting civil litigation for vindicating public rights." *Buckley*, 424 U.S. at 139.

In addition, the *types* of claims that special counsel litigate—those to protect the public fisc—confirm that they perform "sovereign" duties. As one court noted, "all persons who, by authority of law, are intrusted with the receipt of public moneys, through whose hands money due to the public, or belonging to it, passes on its way to the public treasury" must be considered officers. *Evans*, 74 Pa. at 139. Even under the Appointments Clause, Justice Story opined, positions associated with "the collection of revenue" were among "the most important civil officers." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1530, p.387 (1833).

Over the years, therefore, positions performing similar duties have been treated as "officers." District attorneys (now U.S. Attorneys) were once "private practitioners employed by the United States on a fee-for-services basis." *In re Sealed Case*, 838 F.2d 476, 527 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *majority rev'd sub. nom. Morrison v. Olson*, 487 U.S. 654 (1988). As part of their duties, they litigated claims under the revenue laws, receiving, at one time, two percent of any recovery. *Revised Statutes of the United States, Passed at the First Session of the Forty-Third Congress*, 1873-74, § 825 (2d ed. 1878). Likewise, a "considerable portion" of a constable's job was collecting debts, and a "special constable" was "as fully protected as any other officer." Murfree, *su-*

*pra*, §§ 1120-21, p.609. Courts also identified receivers liquidating national banks as "officers" under federal laws. *Price v. Abbott*, 17 F. 506, 507-08 (C.C.D. Mass. 1883); *cf. Weiss v. Weinberger*, 2005 WL 1432190, *4 (N.D. Ind. June 9, 2005) (finding receiver to be officer under the Act). Shortly after Congress enacted the "officer" definition, a court even treated a lawyer appointed to recover state debts as an officer. *Evans*, 74 Pa. at 139-41.

* * *

At day's end, deciding which individuals are "officers" for purposes of particular statutory or constitutional provisions has perplexed courts for generations. "[T]he precise line of demarkation between an officer and governmental agent, employee or contractor, is difficult to draw." Montgomery Throop, *A Treatise on the Law Relating to Public Officers* § 1 p.2 (1892). For purposes of the Act, Plaintiffs concede that "'[t]he term "officer" is ambiguous' and 'open to multiple[] yet reasonable interpretations.'" Pet. App. 60a (Sutton, J., dissenting) (citation omitted). If this Court harbors the same doubt, it compels a ruling for special counsel. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. The Act, like § 1983, can be reasonably read not to require States to add collection lawyers to their payrolls to receive the benefits of a state exemption.

### C. The Sixth Circuit's Contrary View Was Mistaken

The Sixth Circuit mistakenly held that special counsel fall outside the broad "officer" definition.

### 1. The Sixth Circuit read the Dictionary Act's definition too narrowly

Overlooking the expansive initial language in the Dictionary Act's definition, the Sixth Circuit strictly read its two elements.

*Authorized By Law.* It held that special counsel were not "authorized by law" to collect state debts because Ohio law "simply establishe[d] the framework under which the Attorney General may delegate the collection of debts to a third-party debt collector." Pet. App. 32a. An "[a]uthorization to actually act as an officer," the court continued, "entails the actual capability to act, not merely the prospect of a future delegation." *Id.*

Yet the definition does not read "authorized *exclusively* by law" or "authorized *comprehensively* by law"; it reads "authorized by law." A law need only empower the position, nothing more. Thus, many cases found that laws created "officers" by authorizing a superior "to appoint" an inferior. This Court, for example, considered a clerk to be an officer when the statute allowed a superior "to appoint" the clerk. *Hartwell*, 73 U.S. at 393. Another found a "special police officer" to be an officer when a law permitted the sheriff "to appoint" him. *Territory v. Wills*, 25 Haw. 747, 756, 759-60 (1921). And still another found a "health inspector" to be an officer when a law directed a board to appoint him. *Patton v. Bd. of Health*, 59 P 702, 703, 706 (Cal. 1899).

Indeed, the Sixth Circuit's reading would exclude constitutional officers. The Appointments Clause bars Congress from directly empowering certain "officers" to perform their functions; it vests that ap-

pointment power in others. U.S. Const. art. II, § 2, cl. 2. It will always be the case for these officers that a law will create only "the prospect of a future delegation" (a synonym for appointment). Pet. App. 32a. A reading of the statutory term "officer" that excludes constitutional officers is not a good reading.

Further, special counsel were not, as the Sixth Circuit said, "authorized *only* by contract." Pet. App. 33a (emphasis added). The Revised Code references the position dozens of times. It treats special counsel interchangeably with assistant attorneys general, *id.* §§ 109.361, 2743.14, identifying both as "offices [or] positions of trust or employment with the government," *id.* §§ 124.01(K), 124.11(A)(11). It appears that the Attorney General did not even always direct special counsel via formal contracts. A 1975 agency opinion suggested that, at that time, the only "limits which [were] imposed on special counsel" were "those imposed upon any individual or entity responsible for the collection of claims owed to the State." J.A. 382.

The Sixth Circuit lastly invoked the "absurdity" canon, noting that a normal reading of "authorized by law" would "bestow[] officer status" "on every independent contractor working on behalf of a state." Pet. App. 33a-34a. Not so. That a position be authorized by law is *one* requirement, not the *only* one. A person must also perform "the duties of the office," i.e., sovereign duties. Most contracts between an officer and some private party will not appoint the party to perform sovereign tasks. Take the Sixth Circuit's hypothetical building contractor. Pet. App. 34a & n.7 An early opinion defining "officer" rejected this very hypothetical on this very ground. A "contractor to build a state house" is not an officer be-

cause construction work does not encompass "a portion of the sovereign power." *Justices*, 3 Me. at 483. Building public buildings has never been a sovereign function; collecting public money always has.

*Duties Of The Office.* The Sixth Circuit next read "the duties of the office" to require the person to perform "*all duties* associated with the office." Pet. App. 35a. Special counsel, the court added, do not perform all of the Attorney General's duties. *Id.*

Yet "the" does not mean "all." The Dictionary Act uses the definite article to identify the *specific* duties delegated by the *specific* authorizing law. Here, that law permits special counsel to perform the debt-collection duties of the Attorney General's Office. Read otherwise, the Dictionary Act would exclude any *inferior* officer in an office who could not perform all of the *superior*'s duties.

Additionally, special counsel's position should be deemed an "office" within the meaning of *the Act*, which should be read functionally, not formalistically. To be sure, the Sixth Circuit correctly said that *state law* did not identify an "office of special counsel." Pet. App. 35a & n.9. But, under the Act, office status should turn on duties, not labels. *See Clyatt*, 22 So. at 722. The law in *Hartwell*, for example, did not create the "office of the clerk." 73 U.S. at 392-93. The law in *Moore* did not create the "office of special deputy." 39 Conn. at 249-50. And the law in *Evans* did not create the "office of special agent." 74 Pa. at 139-40. When statutorily created positions perform sovereign duties, they may be considered offices under the Act no matter what "name or title they may be designated in the law." *Id.* at 139.

Finally, the Sixth Circuit asserted that collecting *consumer* debt did not involve "sovereign power." Pet. App. 35a-36a. But special counsel *do* collect tax debts, and it would be strange for their "officer" status to fluctuate day-to-day depending on the debt they collected. Regardless, a State's privileges regarding debts have not generally been limited in that way. A sovereign's priority right, for example, did not "attach[] only to taxes"; it "cover[ed] all manner of debts due to the state." *City and Cnty. of Denver v. Stenger*, 295 F. 809, 815-16 (8th Cir. 1924) (citation omitted). And a sovereign's immunity did not depend on the nature of the lawsuit. A State's university could invoke immunity just as much as its tax department, even if the university's conduct "resemble[d] the behavior of 'market participants.'" *See generally Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999).

### 2. The Sixth Circuit wrongly rejected the clear-statement rule

The Sixth Circuit rejected the clear-statement rule because "Ohio is not being regulated; nor is the structure of its government being challenged." Pet. App. 39a. This was factually and legally incorrect. Factually, the Sixth Circuit's reading of the Act *does* affect state structure. A State's choice between special counsel and assistant attorneys general is just as much a structural choice as is its choice between state and local employees. *Ours Garage*, 536 U.S. at 437-39. Indeed, Ohio's Attorneys General have had the generic authority to appoint special counsel *longer* than they have had the generic authority to employ lawyers. *Compare* 97 Ohio Laws at 60, *with* 114 Ohio Laws at 53.

Legally, the Sixth Circuit misread the clear-statement rule. That rule has never been limited to laws "challeng[ing]" state "structure." Many cases apply the rule to laws not regulating the States *at all*. *Bond* invoked it to interpret a federal criminal law not to cover "an amateur attempt by a jilted wife to injure her husband's lover." 134 S. Ct. at 2083. Further, this case involves state debts, the *very* context in which courts may have initially articulated the rule. *Cf. Shelton*, 47 Conn. at 404-05. If it applies anywhere, it applies here.

### 3. The Sixth Circuit placed too much weight on special counsel's employment status

The Sixth Circuit held that special counsel cannot be officers "because they *are* independent contractors" rather than employees. Pet. App. 38a. This reading was textually and historically unsound.

*Textually*, the exemption covers "officer[s] or employee[s]." 15 U.S.C. § 1692a(6)(C). It makes little sense to require, as a strict element of "officer" status, that the person be an "employee" when those words sit next to each other. If Congress meant for all officers to be employees, the Act would simply cover "any employee." The Sixth Circuit thus violated its "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

*Historically*, many officers were not traditional "employees." *Filarsky*, 132 S. Ct. at 1662. That is why the Court adopted a functional test for § 1983's immunities, one that "flows not from rank or title or 'location within the Government,' but from the na-

ture of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (citation omitted). And it is why the Court should adopt a similar test to determine whether a law created an "officer." Just as "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis," *Filarsky*, 132 S. Ct. at 1665, so too "officer" status under the Act should not vary depending on whether an appointed sheriff, constable, or other officer is an independent contractor. *Cf. Young v. City of Bridgeport*, 42 A.3d 514, 520-21 (Conn. App. Ct. 2012); *Swinehart v. McAndrews*, 69 F. App'x 60, 62 (3d Cir. 2003).

#### 4. The Sixth Circuit mistakenly relied on Ohio law and other sections of the Act

The Sixth Circuit's arguments tied to state law and other sections of the Act were likewise mistaken.

*Ohio Law.* The Sixth Circuit asserted that special counsel "fail to qualify as officers" under Ohio law. Pet. App. 39a-42a. Its analysis was irrelevant and overbroad. It was irrelevant because this case involves the meaning of "officer" in a federal statute. If the Sixth Circuit believed that the Act adopted each State's labels, that reading runs counter to the presumption that "Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citation omitted). Courts should examine state law only to determine whether an actor satisfies the Act's *uniformly* broad federal elements—e.g., that a state law empowers a position to perform sovereign duties.

This is nothing new. In the employment context, the Court "relie[s] on the general common law of agency, rather than on the law of any particular State, to give meaning to" terms like "employer" or "employee." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). So, for example, if a State treated *all* lawyers as "officers" of its courts, that would not make all lawyers "officers" under the Act. Similarly, in the § 1983 context, the Court establishes immunities tied to "general principles of tort immunities and defenses"; it does not adopt a state-by-state approach tied to each State's tort immunities. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Steve Filarsky was entitled to qualified immunity under § 1983 whether or not California immunized him from a tort suit. *See Filarsky*, 132 S. Ct. at 1665. So, too, an individual might be an officer under the Act even if not an officer under some state immunity law.

Regardless, the Sixth Circuit painted with too wide a brush. To conclude that special counsel are categorically not officers, it invoked the definition in one Ohio law (the one directing the Attorney General to represent officers or employees), and an agency opinion interpreting another. Pet. App. 39a-42a & n.15; *but see Bell v. Newnham*, 1990 WL 131972, *2 (Ohio Ct. App. Sept. 14, 1990) (finding a special counsel to be an officer or employee triggering court-of-claims jurisdiction). Even if special counsel are not "officers" under *these provisions*, it does not mean that they are not officers under the entire *Revised Code*. To take one example, Ohio's public-records laws govern "records kept by any public office," Ohio Rev. Code § 149.43(A)(1), including some private entities "perform[ing] a governmental function," *State ex rel. Schiffbauer v. Banaszak*, 33 N.E.3d 52, 54-55

(Ohio 2015). Special counsel are "officers" under those laws, as their retention agreements show. J.A. 176. The same sovereign functions that *subject* special counsel to state public-records laws *exempt* them from federal debt-collection laws.

*The Act.* The Sixth Circuit suggested that two sections of the Act support its view that special counsel are not "officers." Pet. App. 42a-43a. One permits the Consumer Financial Protection Bureau to exempt debt-collection practices if it finds that a State has "substantially similar" laws regulating the practices. 15 U.S.C. § 1692o. This section merely allows a State to exempt private debt collectors who collect private debts from the Act if the State regulates those collectors in the same way. It says nothing about the government exemption.

The other section exempts parties who, under contracts with state prosecutors, assist in operating "a pretrial diversion program for alleged bad check offenders." *Id.* § 1692p(a)(1). Contrary to the Sixth Circuit's view, Pet. App. 43a, a holding that special counsel are "officers" would not cover operators of bad-check programs and thereby make § 1692p superfluous. It would be a stretch to characterize those operators as officers; teaching finance classes "designed to discourage the writing of bad checks" is not a sovereign duty. S. Rep. No. 109-256, at 12 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 1219, 1231.

## II. Special Counsel's Use Of State Letterhead Was Not "Misleading"

Whether or not special counsel are state officers, their use of state letterhead did not violate 15 U.S.C. § 1692e. Section 1692e prohibits practices that could

materially mislead consumers. Here, special counsel's use of Attorney General letterhead could not mislead consumers into believing anything that was materially false.

### A. Section 1692e Prohibits Practices That Could Materially Mislead Consumers

Before listing sixteen prohibitions, § 1692e states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* The terms "false," "deceptive," and "misleading" had similar meanings in 1977 Black's Law Dictionary defined "false representation" as "[a] representation which is untrue, willfully made to deceive another to his injury." *Black's Law Dictionary* 724 (4th ed. 1968) [hereinafter *Black's* 4th ed.]; *see* 5 *Oxford English Dictionary* 697 (2d ed. 1989) (defining "false" as "[c]ontrary to what is true"). It defined "deception" as "intentional misleading by falsehood spoken or acted." *Black's* 4th ed., *supra*, at 494; *see* 4 *Oxford English Dictionary* 324 (defining "deceive" as "to cause to believe what is false"). And it defined "misleading" as "calculated to lead astray or to lead into error." *Black's* 4th ed., *supra*, at 1151; *see* 9 *Oxford English Dictionary* 873 (defining "mislead" as "[t]o lead astray in action or conduct").

These definitions show that § 1692e, at bottom, contains two elements. A communication must be capable of making consumers believe something that is "untrue." And the communication must be capable of leading consumers astray in their debt-related "action[s]." This view—that § 1692e prohibits *materially misleading* communications—is confirmed by the conduct that its specific subsections prohibit.

### 1. A communication proscribed by § 1692e must be reasonably capable of conveying an erroneous message

a. Whether a communication is "false, deceptive, or misleading" turns on what it communicates. While some statements might *unambiguously* convey a true or false idea, others will be *ambiguous* and susceptible to different readings—some true, some false. *Cf.* Restatement (Second) of Torts § 527 (1977). Whether a statement could be read misleadingly to convey a falsehood generally depends on how ordinary persons in the intended audience could understand it. By invoking this "average" person in the audience, courts set "a benchmark divorced from any one person, but reflecting the behavior of classes of persons acting reasonably." *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring).

This type of objective test pervades the law. The common law long assessed liability from "what would be blameworthy in the average man, the man of ordinary intelligence and prudence." Oliver Wendell Holmes, Jr., *The Common Law* 108 (1923). Securities cases ask "whether a statement is 'misleading'" from "the perspective of a reasonable investor." *Omnicare, Inc. v. Laborers Dist. Council Ind. Pension Fund*, 135 S. Ct. 1318, 1327 (2015). Trademark cases "demand[] a showing that the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care." *Int'l Ass'n of Machinists v. Winship Green Nursing Ctr.*, 103 F.3d 196, 201 (1st Cir. 1996) (citing *McLean v. Fleming*, 96 U.S. 245, 251 (1877)). False-advertising cases ask wheth-

er an ad could "'mislead consumers acting reasonably under the circumstances.'" *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012); 1A Louis Altman & Malla Pollack, Callmann on Unfair Competition, Trademarks & Monopolies § 5:27 (4th ed.), *available at* Westlaw Callmann.

The same test—one asking whether an *average consumer* in the *relevant audience* could reasonably read a letter to convey a falsehood—best balances the Act's goals. On the one hand, the Act seeks to protect "*consumers*" from "abusive debt collection practices." 15 U.S.C. § 1692(e) (emphasis added). The test accounts for that audience. The average consumer who has defaulted on a debt is different from, say, the average investor reviewing a prospectus, *Omnicare*, 135 S. Ct. at 1327, or the average physician reviewing a drug label, *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring). As the Court said under the Federal Trade Commission Act ("FTC Act"), "that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

On the other hand, the Act seeks "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged" by those who do. 15 U.S.C. § 1692(e). The test accounts for conscientious collectors by requiring more than a showing that a small fraction of consumers could misread a debt-collection letter. Rather, a significant fraction must be able to reasonably misread the letter. "The standpoint is not that of the *least* intelligent consumer in this nation of 300 mil-

lion people, but that of the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (Posner, J.) (citations omitted).

b. To be sure, most courts have adopted a "least-sophisticated consumer standard." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 & n.3 (3d Cir. 2015). But the Court should reject that test.

For one thing, the test itself misleads. "[T]aking 'least sophisticated consumer' seriously," Judge Easterbrook noted, "either condemns all debt collection efforts (because some simpleton is bound to read the most fantastic things into ordinary language) or creates a system random in operation (because courts must be applying some other rule, which they have not communicated to debt collectors)." *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring). His latter prediction has proved true. While these courts link liability to the least-sophisticated consumer, they reject liability "'for bizarre or idiosyncratic interpretations,'" *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3d Cir. 2000) (citation omitted), and "'preserve[] the concept of reasonableness,'" *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005).

For another, the least-sophisticated-consumer test lacks any historical pedigree. An initial court to adopt this test suggested that it came from the FTC Act, noting that a Second Circuit opinion once stated that the FTC "'should look not to the most sophisticated readers but rather to the least.'" *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985) (quoting *Exposition Press, Inc. v. FTC*, 295 F.2d 869,

872 (2d Cir. 1961)). But that opinion described the FTC's test as asking whether an advertisement could "'deceive a substantial portion of the purchasing public.'" *Exposition Press*, 295 F.2d at 872 (citation omitted). "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *In re Kirchner*, 63 F.T.C. 1282, 1963 WL 66830, *6 (1963). Indeed, after the FTC issued clarifications in 1983, it has assessed these claims from the perspective of "consumers acting reasonably." *Davis*, 691 F.3d at 1168; *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, *37 & app. at *46-47 (1984).

### 2. A communication proscribed by § 1692e must concern matters that could affect a debtor's decisionmaking

A representation must also be capable of "lead[ing]" consumers "astray in [their] action or conduct." 9 *Oxford English Dictionary* 873. In other words, it must be material. *See Neder v. United States*, 527 U.S. 1, 16 (1999). "Materiality is an ordinary element of any federal claim based on a false or misleading statement." *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009). The FTC Act, for example, has long included it. *Cliffdale*, 1984 WL 565319, *37. And circuit courts have uniformly adopted this element under the Act. *Jensen*, 791 F.3d at 417-18 (citing cases).

A materiality element furthers the Act's purposes. 15 U.S.C. § 1692(e). Without it, § 1692e could harm conscientious debt collectors. The Act permits plain-

tiffs to recover statutory damages and attorney's fees without proving any injury. 15 U.S.C. § 1692k(a)(2)-(3). It also permits plaintiffs to recover for honest misinterpretations of the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). Courts have recognized that the lack of any need to show a plaintiff's injury combined with the lack of any need to show a defendant's intent has "'enabled'" a sophisticated "'class of professional plaintiffs.'" *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (citation omitted). It would greatly magnify these existing concerns to interpret § 1692e's liability standards as reaching any technical falsehood, no matter how irrelevant to the collection of any debt.

### 3. Section 1692e's specific prohibitions reinforce these general elements

Section 1692e's specific prohibitions reinforce that it covers material misrepresentations. Its subsections generally prohibit materially misleading practices, such as falsely indicating that a letter comes from an attorney or that a debt collector is affiliated with the government. 15 U.S.C. § 1692e(1), (3). The two subsections on which Plaintiffs relied below—§ 1692e(9) and (14)—provide further examples of the *materially misleading* communications that fall within the section. Pet. App. 47a. They prohibit:

> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15 U.S.C. § 1692e.

*The Simulation Prohibition.* Section 1692e(9) bans debt collectors from deceptively indicating that the government has authorized, issued, or approved a letter. Debt collectors can do so in two ways. The subsection initially prohibits a letter from expressly "represent[ing]" that it has been authorized, issued, or approved by the government when that claim is "untrue." *Black's* 4th ed., *supra*, at 724 (defining "false representation"). Even when the letter does not expressly say that the government has approved the communication, the subsection prevents debt collectors from pretending—through formatting or the like—that the government has done so. *Id.* at 1555 (defining "simulate" as "[t]o assume the mere appearance of, without the reality; to assume the signs or indications of, falsely; to counterfeit; feign; imitate; pretend.").

*The "True Name" Provision.* Section 1692e(14) prevents a collector from using an organization name "other than the true name" of the collector's organization. This subsection prohibits debt collectors from "employ[ing]" fictitious names. *Black's* 4th ed., *supra*, at 1710. It, in other words, "forbids the use of a pseudonym," *White v. Goodman*, 200 F.3d 1016, 1018 (7th Cir. 2000), one that might make it difficult for a consumer to discover a debt collector's identity. It does not, by contrast, prohibit debt collectors from using more than one name in letters. The Act, for example, sometimes requires debt collectors to "use"

the creditor's name, mandating that a validation notice include "the name of the creditor to whom the debt is owed." 15 U.S.C. § 1692g(a)(2).

### B. Attorney General Letterhead Accurately Conveys That Special Counsel Sent Letters For The Attorney General's Office

Special counsel's use of Attorney General letterhead would not lead consumers into believing a falsehood. Instead, that letterhead accurately conveys that they act on behalf of the Attorney General's Office when they send the letters. Accordingly, the letterhead neither falsely represents that special counsel's letters are authorized by the office (under § 1692e(9)) nor uses a false name when invoking the office (under § 1692e(14)).

1. When assessed from *any* consumer's perspective, the letterhead conveys that the letters have been sent on behalf of the organization identified (the Attorney General's Office) by the individuals listed in the signature block (special counsel). Pet. App. 14a, 17a. Because those facts speak the truth, no consumer would be "[led] into error" by the letterhead. 9 *Oxford English Dictionary* 873.

Starting at the top, the letterhead identifies the *entity* for whom the letter has been sent. The debt being collected is one owed to a state creditor, for whom state law requires the Attorney General to collect (and send notice). Ohio Rev. Code § 131.02. To that end, the Attorney General appoints special counsel "to represent the state," *id.* § 109.08, by "provid[ing] legal services on behalf of the Attorney General," J.A. 173. Because they act for, and under the general control of, the Attorney General's Office,

the office requires special counsel, "[i]n all pleadings, notices and/or correspondence," to "indicate that such document is prepared by the Special Counsel in its position as Special Counsel for the Attorney General." *Id.* In short, the letterhead conveys *on whose authority* special counsel sends the letters.

Turning to the bottom, the signature blocks identify the *persons* who send the letters for the Attorney General's Office. They note that a "Special Counsel" or an "Outside Counsel" to the Attorney General sent the letters, and identify the law-firm names and addresses at which counsel may be contacted, and to whom the debts should be paid. Pet. App. 14a, 17a; *cf.* J.A. 93, 98. In short, the signature blocks convey *who* has sent the letters for the Attorney General's Office, and *who* assists the office in collecting debts.

In sum, "[t]he Act does not transform the special counsels' use of the Ohio Attorney General's stationary into 'false,' 'deceptive,' or 'misleading' actions under the statute any more than it would do the same if a special counsel listed his or her name and firm under the Ohio Attorney General's name and address in a brief filed in this Court." Pet. App. 63a (Sutton, J., dissenting). That is not a speculative comparison. Because the Act regulates lawyers, courts have considered allegations that judicial pleadings were misleading. *See Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 590 (6th Cir. 2009); *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. 2007). If the use of the Attorney General's name on a complaint does not violate the Act, the use of that name in a letter does not either.

2. Because these letters *accurately* conveyed that they were sent for the Attorney General's Office, spe-

cial counsel's use of the office letterhead does not violate § 1692e(9) or § 1692e(14).

Beginning with § 1692e(9), the letterhead does not make these letters "simulate[]," or "falsely represent[] to be" documents that are "authorized, issued, or approved" by the Attorney General's Office. This letterhead is authorized, approved, and, indeed, *required* by that office. J.A. 93, 112. Because the letters are in "reality" authorized by the office, it cannot be said that they "pretend[]" to be. *Black's* 4th ed., *supra*, at 1555. One need not formally invoke the "expressio unius" canon to interpret a prohibition on false communications as permitting truthful ones.

As for § 1692e(14), the Attorney General's Office is a "true name" of special counsel's organization when they act on its behalf. Special counsel *do* act for the Attorney General's Office and so the office's name is not a pseudonym. *See White*, 200 F.3d at 1018. Indeed, Plaintiffs have conceded that special counsel may say "special counsel to the Attorney General's Office" in the signature blocks. J.A. 396-97. Referencing the office in the letterhead cannot be considered a "false" name either. If the name is true at the bottom of the page, it is true at the top.

Plaintiffs' affidavits confirm that this letterhead does not violate § 1692e. Apart from alleging confusion over the combination of state letterhead and law-firm names, Plaintiffs' only *falsity* allegations are that the letterhead led them to believe that the Attorney General "might charge me with a crime," J.A. 139, or interfere with "my bankruptcy case," J.A. 137 "But neither of the milquetoast letters in the record threatens criminal prosecution, civil penalties, or any action whatsoever." Pet. App. 69a (Sutton, J.,

dissenting). Even the majority below did not credited *those* misleading theories. Pet. App. 45a-54a. Instead, the allegations are the precise types of "unreasonabl[e] misunderst[andings]" that cannot establish liability. *Cf. Kirchner*, 1963 WL 66830, *6.

### C. The Sixth Circuit's Competing Rationales Lack Merit

The Sixth Circuit offered several mistaken reasons for finding a factual dispute over whether special counsel's use of state letterhead violated § 1692e.

1. *The letters came from Mike DeWine?* The Sixth Circuit suggested that the letterhead made the letters "technical[ly]" false because "Mike DeWine is not the true name of any Defendant." Pet. App. 48a. If correct, every letter that an individual other than the Attorney General has sent on Attorney General letterhead has been "technically" false because it communicated that it came personally from the Attorney General when it came from the person signing it. *Cf.* Rule 28(j) Letter of Nov 13, 2009, *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010) (No. 08-4592, Doc.36-1) (assistant attorney general using Attorney General Richard Cordray's letterhead); Rule 28(j) Letter of Sept. 15, 2008, *Wrinn v. Johnson*, 315 F App'x 560 (6th Cir. 2009) (No. 07-4354, Doc.40) (same for Attorney General Nancy Rogers). No person believes that. Consumers are "bound to read collection notices in their entirety." *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008). The signature lines—as they were *not* signed by the Attorney General—dispelled any impression that he *personally* penned them.

2. *The letters came from the office?* The Sixth Circuit suggested that the letterhead falsely "implied that the letter[s] [were] issued by" the Attorney General's Office. Pet. App. 48a; *id.* at 49a (noting that the letterhead suggests "it is the State of Ohio that is threatening to take action"). That was an accurate implication, not a misleading one. Nobody thinks that the Attorney General's Office *itself*—that is, the inanimate entity—literally can "issue" anything. Like any entity, it acts through its representatives. Special counsel act as the office's representatives when they send these letters, just as assistant attorneys general do if they send letters. The Sixth Circuit responded that special counsel "are not" the office because they are independent contractors. Pet. App. 52a-53a. This fact alone has neither legal nor practical significance.

*Legally*, "'[n]othing about the title independent contractor invariably precludes someone from being an agent'"—one entitled to invoke a principal's name. Pet. App. 67a (Sutton, J., dissenting) (citation omitted); Restatement (Second) of Agency § 2(3) (1958). Indeed, if special counsel were *not* agents of the office for some purposes, their litigation against (or settlements with) state debtors could *not* bind the office. Precisely because those activities do so, special counsel must generally obtain approval before filing suit or settling claims. J.A. 149.

In any other context, this is obvious. "Many insurance agents are independent contractors" affiliated with national companies like Nationwide Mutual Insurance. Pet. App. 65a-66a (Sutton, J., dissenting). It is not "misleading" for those individuals to use Nationwide's letterhead when "selling Nation-

wide insurance." Pet. App. 66a. Many local franchisees enter independent-contractor relationships with national fast-food companies. *See Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725 (Cal. 2014). That does not permit a mom-and-pop competitor of a Burger King franchisee to bring a "false designation of origin" claim on the ground that the franchisee's use of the national name misleads consumers into believing that the national company made its hamburgers. *Cf. Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29-37 (2003) (describing false-designation-of-origin claims). In the criminal context, courts have long interpreted a law barring an entity's "agents" from embezzling federal funds as reaching some independent contractors. *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2007). If this reading were "misleading," it would have long ago triggered the criminal law's safety net for the unsophisticated: the rule of lenity.

*Practically*, the Sixth Circuit failed to explain why it would matter to consumers that the person sending these letters was an independent contractor. That distinction, of course, matters as between the contracting parties. Assistant attorneys general receive retirement benefits; special counsel do not. J.A. 94, 173, 193-94. The office pays payroll taxes for assistant attorneys general; it does not for special counsel. *Id.* But the distinction is irrelevant to the powers and duties that assistant attorneys general and special counsel have vis-à-vis debtors. The attorneys are materially indistinguishable from that perspective. Both generally report to the Collections Enforcement Section (and ultimately to the Attorney General); both have the same state-law tools for collecting debts; both may sign pleadings under the At-

torney General's name. J.A. 99-102, 173. In short, the Sixth Circuit failed to explain why a consumer would care that the office provides special counsel with Form 1099s, but gives assistant attorneys general W-2s.

3. *The letterhead confuses?* The Sixth Circuit suggested that the letterhead "has led to confusion" because the office has received calls from debtors "asking whether the letters were authentic." Pet. App. 48-49a. The court ignored what the office says in response to those calls: Yes. J.A. 101. The letterhead is no more "misleading" than that response. Indeed, this point "contradicts plaintiffs' entire theory of liability." Pet. App. 69a (Sutton, J., dissenting). It suggests that special counsel should use bolded disclaimers about how the Attorney General's Office *really* stands behind their collection efforts.

This also turned a virtue into a vice. Unlike Plaintiffs—both of whom quickly contacted their attorneys on receipt of their letters, J.A. 137, 139-40—most debtors *lack* attorneys on demand to ask questions. For the unsophisticated, the letterhead signals counsel's connection to the office and identifies a different outlet for concerns. This might have been one purpose behind the tax law that required special counsel to use the letterhead for tax debts: Ohio law requires the Attorney General to appoint "problem resolution officers" to review tax complaints about "special counsel." Ohio Rev. Code §§ 109.08, .082.

The Attorney General, it bears noting, wears many hats. The office also oversees Ohio's Consumer Sales Practices Act. *Id.* §§ 1345.05-.06. It strives to balance consumer protection and fair collection. Whether or not special counsel are *statutorily* obli-

gated to follow the Act, they remain *contractually* obligated to follow its standards. J.A. 194. The Attorney General's Office "has zero tolerance" for communications with debtors that show "anything less than complete respect for [their] rights." J.A. 193. Yet if debtors remain in the dark about special counsel's connection to the office (because this suit requires them to hide it), they might not know to report real abuse.

4. *The letterhead intimidates?* The Sixth Circuit said that "[i]ntimidation is at the heart of this case," Pet. App. 45a, because the letterhead "may inappropriately influence a consumer's decisions," Pet. App. 53a, even though state creditors lack any "special authority that a regular creditor does not" have, Pet. App. 45a. This argument was wrong for two reasons.

Reason One: It misreads state law If debts have been certified to the Attorney General, a debtor's tax refund "may be applied in satisfaction"—whether or not the debts have gone to judgment. Ohio Rev. Code § 5747.12. That is untrue of private debts. And, unlike with a private creditor, statutes of limitation do not run against state creditors unless they expressly say so. *Ohio Dep't of Transp. v. Sullivan*, 527 N.E.2d 798, 800-01 (Ohio 1988); *cf.* Ohio Rev Code § 2329.07(A). The State also uses lottery prizes exceeding $5,000 to pay state debts. *Id.* § 3770.073(A).

Given these differences, debtors would care that special counsel collect state debts. If anything, special counsel's use of *private* letterhead might lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting from denial of rehearing en banc). It may not be obvious, for example, that Hocking College is a public entity

Thus, the only thing that might be "misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*." Pet. App. 68a (Sutton, J., dissenting).

Reason Two: This intimidation argument severs § 1692e from its falsity roots. The Sixth Circuit held that it would *not* "preclude[] liability under the" Act even if the letters were an "accurate description by special counsel of their relation to the" office. Pet. App. 53a. Likewise, it all but conceded that, but for the government exemption, its view could hold state employees liable. Pet. App. 53a-54a. Both concessions follow from the court's holding that the "leverage" achieved by the letterhead violates § 1692e. Pet. App. 54a.

Yet § 1692e targets deception, not intimidation. It sometimes compels "intimidating" statements, as is shown by its subsections on "legal process." One prohibits a debt collector from falsely representing "that documents are legal process," 15 U.S.C. § 1692e(13), because that falsehood would intimidate debtors into believing that the debt collector has gotten the courts involved. If, however, the debt collector *has* gotten the courts involved, another subsection prohibits the debt collector from falsely representing "that documents are not legal process," because that falsehood will lead debtors into a mistaken sense of security (even if the debt collector was trying to be less "intimidating"). *Id.* § 1692e(15).

The Sixth Circuit's broad view of the Act's substantive provisions also doubled down on the harms to state sovereignty arising from its narrow view of the Act's "officer" exemption. The decision below told States not only that they are *subject* to the Act if they

structure their debt collection in certain ways, but also that their decision to delegate debt collection to their chief legal officer could *violate* the Act if they do not hide that structure from debtors. The Sixth Circuit's merits holding thus ran afoul of the clear-statement rule just as much as its exemption holding. States have the right to collect their debts through "the structure" that they see fit. *Gregory*, 501 U.S. at 460. Here, the Court should not read § 1692e in a way that "trench[es] on" Ohio's century-old decision to collect debts through its Attorney General. *Nixon*, 541 U.S. at 140.

5. *Sarah Sheriff was not special counsel?* The Sixth Circuit briefly noted that "Sarah Sheriff," who signed the letter sent to Plaintiff Meadows, was "not a special counsel." Pet. App. 48a. The court rightly placed no further significance on this letter-specific point because it does not match Plaintiffs' counts, which asserted class-wide allegations focused on the *general* use of the letterhead. *See* J.A. 52-57.

If the Court dives into the letter-specific facts, it will find the mistake immaterial (like the district court). Pet. App. 96a-97a. Fact One: In 2008, special counsel and Meadows signed a judgment entry in which she, with her counsel, agreed to pay this debt. J.A. 388-90. Fact Two: Meadows paid for years. J.A. 385. Fact Three: Sheriff recalls fielding a call from Meadows asking her how much she owed; Sheriff sent the letter in response. J.A. 385. Fact Four: The letter says that, "[p]er your request, this is a letter with the current balance," and that Meadows may contact Sheriff with "further questions." Pet. App. 17a. Against all this, Meadows says: "I don't recall ever asking anyone for any information about this

matter." J.A. 139. That does not create a jury question. *Cf. Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 541 (5th Cir. 2015) ("Lack of memory by itself is insufficient to create a genuine dispute of fact."). No person would find the signer's status relevant for a letter conveying a balance. *See Jensen*, 791 F.3d at 422 (listing wrong name on subpoena "could not possibly have affected" debtor's "'ability to make intelligent decisions'" (citation omitted)).

* * *

"Some lawsuits make sense only to lawyers." *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 400 (6th Cir. 2015) (Kethledge, J., dissenting). Courts, for example, have rejected claims that a debt collector misleadingly called a credit-card debt a "loan" when consumers really know that debt as "a merchant's account receivable," *Miller*, 561 F.3d at 592, or that a debt collector's state-mandated disclaimer about the rights of Coloradoans misleadingly implied to non-Coloradoans that they lacked similar rights, *White*, 200 F.3d at 1020. This Court too should reject the claim that special counsel for the Attorney General's Office cannot invoke the office's name pursuant to its command. The Court has elsewhere recognized the risks of "permit[ing] a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (citation omitted). Those risks reach their apex under the Act, whose procedural provisions already "create incentives to file lawsuits even where no actual harm has occurred." *Jerman*, 559 U.S. at 616 (Kennedy, J., dissenting).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## 1. 15 U.S.C. § 1692a.

**Definitions.**

As used in this subchapter –

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of col-

lecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is inci-

dental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

**2. 15 U.S.C. § 1692e.**

**False or misleading representations.**

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

**3. Ohio Rev. Code § 109.08.**

**Special counsel to collect claims.**

The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.

The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of Chapters 5733., 5739., 5741., and 5747. of the Revised Code the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.